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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 714

DELORA HUFF PAGE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-31) is reported at 350 F.2d 28. The findings of fact and conclusions of law of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1965. The petition for a writ of certio-

rari was filed on November 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government owed employees of its admittedly competent independent contractor the duty to supervise the contractor's performance of the contract to ensure that the work was done in a safe manner.

2. Whether the government owed employees of its contractor engaged in dangerous work on the latter's premises a non-delegable duty to ensure that the contractor safely performed the work.

3. Whether the court of appeals correctly determined that the government was not the supplier of the allegedly dangerous instrumentality used by the employees of its contractor.

STATEMENT

This is an action for damages under the Tort Claims Act for the alleged wrongful death of an employee of an independent contractor with the government, which occurred as the result of an explosion at the contractor's plant. The undisputed facts, as they appear from the opinion of the court of appeals, may be summarized as follows:

The contractor, Hercules Powder Company, had been engaged by the government to perform a cost-reimbursement plus fixed-fee contract for research and development work on the Minuteman Intercontinental Ballistic Missile. The contractor supplied the

necessary personnel, facilities, and materials, and the government furnished various items of equipment and supplies. Under the contract, title to property acquired by the contractor vested in the United States at the time of its acquisition. The contract provided that Hercules was to comply with specific safety requirements, including specified Air Force technical orders, and any additional safety measures required by the contracting officer.

One item manufactured by Hercules under the contract was solid fuel propellant for scale model experimental rockets. The propellant was made by placing a mixture of explosive powder, plasticizers, and nitroglycerin in a mold and subjecting the mold to a curing process. The explosion which resulted in the death of petitioner's decedent and two fellow workers occurred while they were removing a number of these molds from the curing room and placing them on a trailer outside the curing building.

Although finding that the exact cause of the detonation was unknown, and the "greater probability, but while still conjecture, is that an FPC mold set was either pushed or pulled over or that an object or thing impacted with a mold set with sufficient force to detonate it" (Pet. App. 25), the district court held the government liable for Page's death, on the ground that provisions of the contract imposed on the government various duties to the contractor's employees and that breach of those duties was the proximate cause of the death of petitioner's decedent. The court of appeals reversed, holding that contract provisions which reserve to the United States the right to prescribe safety re-

quirements in addition to those set out in the contract and to inspect the contractor's facilities and work do not create duties to employees of the contractor. The court also noted that under established principles of tort law no such duty arose as a result of the government's having undertaken to make safety inspections, since the contractor retained primary responsibility for the safety of its employees and directly supervised and controlled their work. In any event, the court of appeals stressed, there was no showing of a causal connection between any improper practice or defective equipment and the accident; the district court's findings indicated, rather, that the "failure was a human one which caused one of the molds to fall" (Pet. App. 26).

The court of appeals rejected petitioner's argument that the government was the supplier of a dangerous chattel, liable for any injury caused by the chattel if it failed to exercise reasonable care to make the chattel safe for the use for which it was supplied. The court pointed out, among other things, that the government was not the supplier of the chattel involved (the mold sets) for purposes of tort liability, since it merely had bare title, not possession or control.

ARGUMENT

The court of appeals correctly concluded that in the circumstances of this case the government was not liable under the Tort Claims Act for the death of petitioner's decedent. The decision of the court of appeals is not in conflict with the decision of any other

court of appeals, nor does it raise any significant questions of law warranting review by this Court. Accordingly, further review is not warranted.

1. The courts have consistently held that contract provisions, such as those in the instant case, reserving to the government the right to inspect the contractor's work and facilities to ensure that the contract is complied with, and to prescribe safety requirements in addition to those spelled out in the contract, do not create actionable duties of the government toward employees of the contractor;[1] the reason is that the contractor, not the government, is responsible for and exercises direct supervision and control over the employers and their work. For the same reason, the government is not deemed to assume obligations to the independent contractor's employees by undertaking to make safety inspections.[2] At all events, as the court

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[1] *E.g., Kirk* v. *United States*, 270 F.2d 110, 116-118 (C.A. 9); *Blaber* v. *United States*, 212 F. Supp. 95, 99 (E.D.N.Y.), affirmed, 332 F. 2d 629 (C.A. 2); *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177, 179 (C.A. 2); *Grogan* v. *United States*, 341 F.2d 39 (C.A. 6).

[2] *Blaber* v. *United States*, 332 F. 2d 629 (C.A. 2); *Kirk* v. *United States*, *supra*, n. 1; see, also, *Wallach* v. *United States*, 291 F. 2d 69 (C.A. 2); *Buchanan* v. *United States*, 305 F. 2d 738 (C.A. 8). Petitioner's reliance (Pet. 7) on *Schmid* v. *United States*, 273 F. 2d 172 (C.A. 7), is misplaced. In that case the court construed the Illinois Scaffolding Act to place a duty on the owner of property to assure that scaffolding on the property complied with the requirements of the statute; there is no similar statute here. In any event, the *Schmid* decision was in effect overruled in *Cannon* v. *United States*, 328 F. 2d 763 (C.A. 7), where the court of appeals refused to follow *Schmid*, since the State Supreme

of appeals pointed out, there was no evidence whatever in this case showing that any improper practice or defective equipment was the cause of the explosion.

2. Petitioner argues that the dangerous nature of the work imposed on the government a non-delegable duty to employees of the contractor to ensure that the contractor performed the work safely. However, as the court of appeals noted (Pet. App. 29), such a duty normally does not extend to employees of an independent contractor nor does it impose liability upon one who neither owned nor controlled the property on which the death or injury occurred. See *Galbraith* v. *United States*, 296 F. 2d 631, 634 (C.A. 2); *Buchanan* v. *United States*, 305 F. 2d 738 (C.A. 8).[3] Further, the express terms of the Tort Claims Act preclude holding the government liable for the contractor's negligence: Congress excluded from the definition of the term "employee of the Government" (for whose negligence the United States is liable) independent contractors with the government. See 28 U.S.C. 2671.

Court had adopted a different construction of the Illinois Act. See *Gannon* v. *Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, 22 Ill. 2d 305, 175 N.E. 2d 785.

[3] Petitioner's reliance (Pet. 7) on *United States* v. *Pierce*, 235 F. 2d 466 (C.A. 6), affirming, on the basis of the district court's opinion, 142 F. Supp. 721 (E.D. Tenn.), is misplaced. While the court in that case purported to impose liability under a non-delegable duty rule, it in fact found specific negligence on the part of government employees (see 142 F. Supp. at 733-734). More important, there, unlike here, the United States owned, possessed, and controlled both the premises on which the injury occurred and the instrumentality which caused the injury.

3. Clearly not a question meriting review by this Court is whether or not the government may be deemed the "supplier" of the mold sets. Petitioner stresses that under the contract between Hercules and the government title to the mold sets vested in the United States. But, as the court of appeals pointed out, it is undisputed that the government never had possession or control of them: they were manufactured by, and at all relevant times were within the exclusive possession and control of, the contractor. In these circumstances, the United States plainly cannot be held liable on the theory that it failed to exercise reasonable care to make the mold sets safe for the use supplied—irrespective of whether it could in a technical sense be regarded as their "supplier" because it had bare title to them.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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